

WO

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

11 IN RE LIFELOCK, INC., MARKETING )  
12 AND SALES PRACTICES ) MDL Docket No. 08-1977-PHX-MHM  
13 LITIGATION )  
(Gerhold v. Lifelock, Inc., et al., CV-08-  
2031-PHX-MHM; Falke v. Lifelock, Inc.,  
et al., CV-08-2027-PHX-MHM )

## ORDER

Currently pending before the Court is Plaintiff Kevin Gerhold, individually, and on behalf of all others similarly situated in the State of West Virginia, and Plaintiffs Gerald and Marlene Falke, individually, and on behalf of all others similarly situated in the State of Maryland, Consolidated Motion to Remand Pursuant to 28 U.S.C. § 1447. After reviewing the pleadings and holding oral argument, the Court issues the following Order.

## I. Procedural Background

On June 13, 2008, Defendants LifeLock and Richard Todd Davis filed a Motion for Transfer and Consolidation, Pursuant to 28 U.S.C. §1407, with the Judicial Panel on Multi-district Litigation (the “MDL Panel”). On October 17, 2008, the MDL Panel issued a Transfer Order in the consolidated litigation entitled, In Re Lifelock, Inc. Marketing and Sales Practices Litigation, MDL No. 1977 transferring all of the Lifelock cases to this Court.

1 In the Transfer Order, the MDL Panel found that the nine actions pending in federal courts  
2 across the country, including the Falke and Gerhold cases which were removed from state  
3 court to federal court, and at least three tag along actions:

4 [I]nvolve[d] common questions of fact, and that centralization under [28  
5 U.S.C.] Section 1407 in the District of Arizona will serve the convenience of  
6 the parties and witnesses and promote the just and efficient conduct of the  
7 litigation. All actions share allegations concerning the marketing, advertising,  
8 and service guarantee offered by common defendant LifeLock. Centralization  
under Section 1407 will eliminate duplicative discovery; prevent inconsistent  
pretrial rulings, particularly with respect to class action issues; and conserve  
the resources of the parties, their counsel and the judiciary.

(See Dkt.#1.)

9 To further its goal of efficiently guiding through pre-trial all of the cases that had been  
10 consolidated and transferred, on January 9, 2009, the Court issued its Practice and Procedure  
11 Order. (See Dkt.# 35.) On February 11, 2009, the Court directed Plaintiffs to provide  
12 briefing as to the appointment of an interim lead counsel pursuant to Fed. R. Civ. P. 23(g).  
13 (See Dkt.#46.) On February 19, 2009, the Court held an Initial Status Conference where it  
14 heard oral arguments on the appointment of interim lead counsel. It also discussed setting  
15 forth a Scheduling Order for the case including deadlines for the filing of a consolidated  
16 amended complaint, motion(s) to dismiss, fact and expert discovery, class certification, and  
17 summary judgment. (See Dkt.#58.) On February 23, 2009, the Court issued an Order  
18 naming Hagens Berman Sobol Shapiro LLP as interim lead counsel pursuant to Fed.R.Civ.P.  
19 23(g), and on March 6, 2009, the Court entered its Amended Scheduling Order. (See  
20 Dkt.#69.)

21 Pursuant to the Court's Scheduling Order, counsel for the Falke and Gerhold Plaintiffs  
22 filed the instant Consolidated Motion to Remand. The Court would be remiss if it did not  
23 note the unusual procedural posture of this motion. Interestingly, Defendants LifeLock and  
24 Davis declined to file a brief before the Court on this matter. Defendants can therefore be  
25 fairly characterized as having neither opposed nor supported the remand sought by the Falke  
26 and Gerhold Plaintiffs. Although Defendants declined to file a brief, interim lead counsel  
27 for the proposed MDL class did. The remaining MDL Plaintiffs, acting through its interim  
28 lead counsel, oppose the Falke and Gerhold Plaintiffs' motion As such, this issue pits

1 Plaintiffs from two of the consolidated cases against Plaintiffs from the remaining fourteen  
2 in a struggle over whether this Court should keep together or break apart the MDL action that  
3 has been transferred to it by the MDL Panel.<sup>1</sup>

4 **II. Discussion**

5 The removal statute authorizes the defendant to remove to federal court “any civil  
6 action brought in a State court of which the district courts of the United States have original  
7 jurisdiction.” 28 U.S.C. § 1441(a). In other words, “[o]nly state court actions that originally  
8 could have been filed in federal court may be removed to federal court by the defendant.”  
9 Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). The party invoking the removal  
10 statute bears the burden of establishing federal jurisdiction. See Ethridge v. Harbor House  
11 Restaurant, 861 F.2d 1389, 1393 (9th Cir. 1988). Courts strictly construe the removal statute  
12 against removal. Id.

13 In the instant motion, the Falke and Gerhold Plaintiffs contend that Defendants  
14 LifeLock and Davis failed to meet their burden under 28 U.S.C. § 1331 and § 1332 to invoke  
15 federal jurisdiction. Accordingly, these two Plaintiffs argue that the Court must remand their  
16 Complaints back to state courts in West Virginia and Maryland where their cases originated.  
17 The non-moving Plaintiffs have responded by arguing that the Falke and Gerhold Complaints  
18 meet ‘arising under’ jurisdiction pursuant to 28 U.S.C. § 1331. Furthermore, the remaining  
19 Plaintiffs argue that in the event the Court grants the Falke and Gerhold Plaintiffs’  
20 consolidated remand motion, then counsel for those parties, Mr. David Paris, should not be  
21 permitted to simultaneously represent parties in the MDL action and before West Virginia  
22 and Maryland state courts.

23

24

25

---

26 <sup>1</sup>Lastly, within five days following the Court's ruling on the instant motion, interim  
27 lead counsel for proposed MDL class will be filing the Master Complaint; fact and expert  
discovery in the MDL will then commence with the filing of the Master Complaint and will  
28 continue for 13 months.

1           **A. 28 U.S.C. § 1332: Diversity Jurisdiction**

2           Section 1332(a) vests the district courts with “original jurisdiction of all civil actions  
3 where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest  
4 and costs, and is between” diverse parties. See 28 U.S.C. § 1332(a). Despite the statute’s  
5 silence, the Supreme Court has held that § 1332 requires complete diversity of citizenship.  
6 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005) (“In a case with  
7 multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff  
8 from the same State as a single defendant deprives the district court of original diversity  
9 jurisdiction over the entire action.”) (internal citations omitted).

10          The Class Action Fairness Act of 2005 (“CAFA”) modified traditional principles of  
11 diversity jurisdiction in order to make it easier for defendants to remove class actions to  
12 federal court. See U.S.C. § 1332(d). CAFA grants the district court with original jurisdiction  
13 over any civil case where, among other things, the amount in controversy exceeds the sum  
14 or value of \$ 5,000,000, exclusive of interest and costs, and minimal diversity between the  
15 parties is present — for purposes of CAFA, minimal diversity means that at least one  
16 member of the purported class must be diverse from at least one named defendant. See  
17 U.S.C. § 1332(d). In addition, the Ninth Circuit has held that CAFA did not shift to the  
18 plaintiff the burden of establishing that there is no subject matter jurisdiction in federal court.  
19 See Abrego v. Dow Chem. Co, 443 F.3d 676, 685 (9th Cir. 2006).

20          In the instant case, the Falke and Gerhold Plaintiffs contend that the notice of removal  
21 filed by Defendants LifeLock and Davis fails to set forth the requirements needed to invoke  
22 federal diversity jurisdiction pursuant to § 1332(a) or CAFA. Specifically, the moving  
23 Plaintiffs claim that Defendants have not provided any factual proof that the Falke and  
24 Gerhold Complaints meet the amount in controversy requirement under either 1332(a) or  
25 CAFA. For purposes of traditional diversity jurisdiction under § 1332(a), in order to satisfy  
26 the amount in controversy requirement, each proposed individual class member in both the  
27 West Virginia and Maryland cases must have an individual claim against the Defendants that  
28 exceeds \$75,000. For purposes of invoking jurisdiction under CAFA, the amount in

1 controversy between all proposed plaintiffs in the Falke and Gerhold classes and Defendants  
2 LifeLock and Davis must exceed \$5,000,000. In other words, to meet the amount in  
3 controversy under CAFA, Defendants' liability must be greater than \$5,000,000 in both  
4 actions, separately.

5 According to the moving Plaintiffs, their two Complaints do not contain any specific  
6 damages allegations, and Defendants' Notice of Removal in both cases contain nothing more  
7 than conclusory statements on damages but are otherwise devoid of specific facts that might  
8 tend to establish the amount in controversy requirement has been met. With respect to the  
9 Falke Complaint, Defendants' Notice of Removal states nothing more than that the amount  
10 in controversy exceeds \$75,000 under § 1332(a), and \$5,000,000 for CAFA. (See Dkt.#74,  
11 Ex. C at ¶ 6-7.) With respect to the Gerhold Complaint, the Notice of Removal only states  
12 that the amount in controversy exceeds \$75,000, but it does not even make reference to the  
13 \$5,000,000 in controversy required under CAFA. (See Dkt.#74.,Ex. D at ¶ 7.) As the  
14 moving Plaintiffs point out, the amount specified in the Complaint usually controls whether  
15 the jurisdictional amount in controversy requirement has been satisfied. Bartinkowski v.  
16 NVR, Inc., 2009 U.S. App. LEXIS 852, \*10-11 (4th Cir. Jan. 16, 2009) (citing Wiggins v.  
17 North Am. Equitable Life Assurance Co., 644 F.2d 1014, 1016 (4th Cir. 1981)). However,  
18 when plaintiffs are not required by state law to specify damages in their state court  
19 complaint, "the removing defendant must prove by a preponderance of the evidence that the  
20 amount in controversy requirement has been met." Abrego, 443 F.3d at 683. Under this  
21 burden, the defendant must provide evidence that it is 'more likely than not' that the amount  
22 in controversy satisfies the federal diversity jurisdictional amount requirement. Id. (citing  
23 Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996)).

24 In the instant case, nothing contained in Defendants Notice of Removal would permit  
25 the Court to conclude that Defendants have demonstrated that it is more likely than not that  
26 the two Complaints state individual claims for over \$75,000 or are worth in total more than  
27 \$5,000,000 each. Of course, as previously noted, Defendants chose not to file a response  
28 brief on this issue, or supplement their Notice of Removal with additional factual or legal

1 support. Besides a bare bones assertion that the value of the Falke and Gerhold cases exceed  
2 the amount in controversy requirement of § 1332(a) and CAFA, no evidence in the Notice  
3 of Removal or elsewhere supports this claim. Standing alone, Defendants Notice of Removal  
4 does not prove by a preponderance of the evidence that the Falke and Gerhold Complaints  
5 properly invoke federal diversity jurisdiction under either § 1332(a) or CAFA.

6       **B.     28 U.S.C. § 1331: Federal Question Jurisdiction**

7           Under 28 U.S.C. § 1331, district courts “have original jurisdiction [over] all civil  
8 actions arising under the Constitution, laws, or treaties of the United States.” See 28 U.S.C.  
9 § 1331. A case ‘arises under’ federal law if (1) a plaintiff’s “well-pleaded complaint  
10 establishes either that federal law creates the cause of action” or (2) that the “plaintiff’s right  
11 to relief under state law requires resolution of a substantial question of federal law in dispute  
12 between the parties.” Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S.  
13 Cal., 463 U.S. 1, 27-28 (1983).

14          With respect to second type of cases, a state based cause of action can invoke federal  
15 question jurisdiction pursuant to § 1331, only if it “necessarily raise[s] a stated federal issue,  
16 actually disputed and substantial, which a federal forum may entertain without disturbing any  
17 congressionally approved balance of federal and state judicial responsibilities.” Grable &  
18 Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005).

19          However, the Supreme Court has called the Grable rule “special,” noting that it  
20 encompasses no more than a “small category” of cases. Empire HealthChoice Assurance,  
21 Inc. v. McVeigh, U.S. 677, 699 (2006). The Supreme Court further emphasized that “it takes  
22 more than a federal element to open the arising under door.” Id. at 701. This comports with  
23 the Ninth Circuit’s pre-Grabel rule that federal “jurisdiction over a state-law claim is not  
24 created just because a violation of federal law is an element of the state law claim.” Wander  
25 v. Kaus, 304 F.3d 856, 859 (9th Cir. 2002). Furthermore, merely because “a [state-law] claim  
26 can be supported by alternative and independent theories — one of which is a state law  
27 theory and one of which is a federal law theory — federal question jurisdiction does not  
28 attach . . .” Glanton v. Harrah's Entm't, Inc., et al., 297 Fed. Appx. 685, 2008 U.S. App.

1 LEXIS 22487, at \*\* 3-4 (9th Cir. 2008) (citing Rains v. Criterion Sys., Inc., 80 F.3d 339,  
2 342-43 (9th Cir. 1996)). “[C]ountless claims can be said to depend in some way on federal  
3 propositions, yet not all such cases ‘arise under’ federal law,” Hunter v. United Van Lines,  
4 746 F.2d 635, 645 (9th Cir. 1985), and the mere appearance of a federal issue is not “a  
5 password opening federal courts to any state action embracing a point of federal law.” Grable  
6 & Sons, 545 U.S. at 314.

7 In the instant case, because the Falke and Gerhold Complaints allege nothing more  
8 than that Defendants LifeLock and Davis have violated the West Virginia Consumer Credit  
9 and Protection Act, W. Va. Code § 46A-1-101 et seq., and the Maryland Consumer  
10 Protection Act, Md. Commercial Code Ann. §13-301 et seq., — which are state law causes  
11 of action — their claims were not explicitly created by federal law. Therefore, this Court can  
12 only properly assume federal question jurisdiction over these two cases if Plaintiffs state law  
13 causes of action meet the two-part test promulgated by the Supreme Court in Grable and  
14 related cases.

### 15 1. Actual and Disputed Issue of Federal Law

16 The MDL Plaintiffs opposing remand contend that the Falke and Gerhold Complaints  
17 raise an actual and disputed issue of federal law, since resolution of these cases necessarily  
18 requires a determination of whether Defendants LifeLock and Davis violated the Fair Credit  
19 Reporting Act, 15 U.S.C. §1681, et seq. (“FCRA”). According to the non-moving Plaintiffs,  
20 throughout both Complaints, the Falke and Gerhold Plaintiffs allege violations of the FCRA  
21 and refer to other conduct implicating the FCRA, including the manner in which LifeLock’s  
22 services impacted its subscribers’ creditworthiness, or otherwise violated protections  
23 afforded under the FCRA. For example, according to the non-moving Plaintiffs, both the  
24 Falke and Gerhold Complaints allege that LifeLock’s services can negatively impact the  
25 subscriber’s credit score and that LifeLock fails to disclose the ‘true origin’ of the free credit  
26 report it obtains for its customers. Thus, the remaining MDL Plaintiffs argue that the success  
27 of the Falke and Gerhold Plaintiffs’ cases will inevitably turn on their ability to offer  
28 evidence that LifeLock and Davis violated federal law.

1        In their reply, the moving Plaintiffs argue that the state based claims contained in the  
2 Falke and Gerhold Complaints are unrelated to the statutory framework of the FCRA, and  
3 that these causes of action are based solely on LifeLock's alleged campaign of false  
4 advertising, which is actionable under state consumer protection statutes, irrespective of any  
5 federal issues. According to the moving Plaintiffs, their two Complaints seek to establish that  
6 LifeLock deceived subscribers residing in Maryland and West Virginia by misrepresenting  
7 the scope of its services, misrepresenting the effectiveness of its services, omitting the  
8 adverse impact its services may have on a subscriber's credit, omitting that credit reports are  
9 free, and misrepresenting the scope of its purported \$ 1,000,000 guarantee. Such allegations,  
10 according to the moving Parties, do not turn upon an analysis of the FCRA.

11       This Court agrees with the moving Parties and finds that their state law claims do not  
12 raise an actual and disputed issue of federal law, and as such do not meet 'arising under'  
13 jurisdiction pursuant to § 1331. First, despite representations made by the remaining MDL  
14 Plaintiffs, it is not at all clear that proving a violation of the FCRA is an essential element of  
15 the Falke and Gerhold Plaintiffs' claims. Certainly, demonstrating a FCRA violation is not  
16 generally required for any and all claims brought under West Virginia or Maryland's  
17 consumer protections statutes. It is therefore not inconceivable for the Falke and Gerhold  
18 Plaintiffs to successfully assert claims under these statutes without having to rely upon  
19 purported violations of the FCRA. Because proving a FCRA violation is not a legal  
20 requirement or an essential element of the two consumer protection statutes at issue, the  
21 moving Plaintiffs might be said to possess "alternative and independent theories" under state  
22 law. Glanton, U.S. App. LEXIS 22487, at \*\* 3-4.

23       Furthermore, even if the Court were to determine that proving a violation of the FCRA  
24 were an essential element of both Falke and Gerhold's state law claims, the Ninth Circuit has  
25 explicitly held that federal "jurisdiction over a state-law claim is not created just because a  
26 violation of federal law is an element of the state law claim." Wander, 304 F.3d at 859.  
27 Similarly, it is difficult for the Court to discern how the instant motion is materially  
28 distinguishable from the U.S. Supreme Court case of Merrell Dow Pharmaceuticals, Inc. v.

1       Thompson, 478 U.S. 804 (1986). In Merrell Dow, the plaintiffs brought a state based  
2 negligence claim in state court against a pharmaceutical manufacturer. Merrell Dow, 478  
3 U.S. at 805-06. The Merrell Dow plaintiffs alleged that the drug at issue caused certain birth  
4 defects in children whose mothers had taken the drug during pregnancy. Id. The plaintiffs  
5 alleged that because the drug had been allegedly mislabeled in violation of the federal Food,  
6 Drug and Cosmetic Act, 21 U.S.C. § 301, et seq., the doctrine of negligence per se applied,  
7 and the manufacturer would be held liable for any harm that it actually and proximately  
8 caused. Id. The defendant then attempted to remove the case to federal court where it asserted  
9 federal question jurisdiction under § 1331. Ultimately, the Supreme Court rejected the  
10 defendant's argument that a simple state tort action could 'arise under' federal law merely  
11 because the defendant's liability was premised upon a violation of a federal regulation.<sup>2</sup> The  
12 same result should apply here: even if Falke and Gerholds' state consumer protection claim  
13 is premised upon a violation of the FCRA, that by itself is not enough to invoke 'arising  
14 under' jurisdiction under § 1331.

15       Moreover, the non-moving MDL Plaintiffs' argument appears inconsistent with other  
16 relevant Supreme Court decisions on the 'arising under' issue. For example, the Supreme  
17 Court has repeatedly stated that "the classic example of federal-question jurisdiction  
18 predicated on the centrality of a federal issue is Smith v. Kansas City Title & Trust Co., 255  
19 U.S. 180 (1921)." Empire HealthChoice, 547 U.S. at 699 n.5; Grable, 545 U.S. at 312 ("The  
20 classic example is Smith . . ."). Smith concerned "a suit by a shareholder claiming that the  
21 defendant corporation could not lawfully buy certain bonds of the National Government  
22 because their issuance was unconstitutional. Although Missouri law provided the cause of  
23

---

24       <sup>2</sup>Also at issue in Merrell Dow was the fact that Congress had not created a private  
25 right of action to enforce violations of the federal Food, Drug and Cosmetic Act. Merrell  
26 Dow, 478 U.S. at 813 (Congress' intent to deny a private a right of action was "tantamount  
27 to a congressional conclusion that the presence of a claimed violation of the statute as an  
28 element of a state cause of action is insufficiently 'substantial' to confer federal question  
jurisdiction."). Because the FCRA does contain a private right of action, that portion of the  
Merrell Dow opinion is not entirely relevant to the instant case.

1 action, the Court recognized federal-question jurisdiction because the principal issue in the  
2 case was the federal constitutionality of the bond issue.” Grable, 545 U.S. at 312 (citing  
3 Smith, 255 U.S. at 199. Obviously, there is a important federal interest that is at stake in  
4 ensuring that the issuance of U.S. bonds are governed by set of uniform rules of national  
5 applicability. It would be an untenable situation for the same U.S. bonds to be deemed  
6 unconstitutional in the state of Missouri, but say, perfectly acceptable for state-wide  
7 distribution in neighboring Kansas. In no sense does the instant motion present facts that are  
8 comparable with a case like Smith. Instead, the Falke and Gerhold Complaints present  
9 nothing more than alleged violations of two run-of-the-mill state based consumer fraud  
10 statutes. Unlike Smith, Grable or other cases where a state based claim was held to ‘arise  
11 under’ federal law, there is no special need for federal uniformity in adjudicating cases Falke  
12 and Gerhold in federal court. Cf. Grable, 545 U.S. at 315 (noting that there is a substantial  
13 federal interest at stake when the interpretation of a provision of the federal tax code might  
14 affect the government’s ability to efficiently collect delinquent taxes).

15                   **2.     Congressionally Approved Balance of Federal and State Judicial**  
16                   **Responsibilities**

17                  Although the MDL Plaintiffs’ attempt to invoke federal question jurisdiction fails  
18 under the first prong of Grable, it is worth addressing their remaining claims that the balance  
19 between federal and state judicial responsibilities would be best served by keeping these two  
20 cases in federal court. Among other things, the non-moving Plaintiffs contend that allowing  
21 remand of the Gerhold and Falke Complaints, which allege facts that are almost identical to  
22 the Complaints of other MDL Plaintiffs, would invite lawyers across the country to file  
23 similar and unremovable lawsuits in various state court. Thus, resulting in forcing  
24 Defendants to engage in costly and redundant litigation in multiple forums.

25                  First, it should be noted that permitting a remand of the Falke and Gerhold cases will  
26 in no way interfere with the MDL action. The remaining MDL cases will proceed as  
27 scheduled, and the only difference in the constitution of the MDL from this point forward  
28 will be that—in order to avoid duplicative litigation, inconsistent judgments, and to minimize

1 or avoid the preclusive effect of the doctrines of res judicata and collateral estoppel—claims  
2 brought by proposed class members in the State of West Virginia and the State of Maryland  
3 will no longer be entertained by this Court as part of the MDL. However, the MDL will  
4 otherwise proceed forward with respect to proposed class members located in every other  
5 appropriate state.

6 Second, with respect to the remaining MDL Plaintiffs' argument that this ruling may  
7 invite lawyers to file tag-along state based claims in the remaining forty-eight states, that  
8 argument is unavailing. If Defendants were worried about the potential costs of facing  
9 unremovable parallel state actions, one assumes that they would have weighed in on the  
10 instant motion; but they did not.

11 Accordingly, the Court finds that the Falke and Gerhold Complaints do not invoke  
12 federal question jurisdiction under § 1331.

13 **C. Potential Conflicts if Mr. Paris Continues to Serve as Plaintiffs' Counsel  
14 in the MDL Proceeding**

15 The final issue relates to an apparent request made by interim lead counsel that Mr.  
16 Paris should be removed as counsel of record in his remaining MDL cases once the Court  
17 remands Falke and Gerhold to their respective state courts.<sup>3</sup> Although interim lead counsel  
18 has not filed an official motion requesting Mr. Paris' disqualification, in their responsive  
19 briefing on the remand issue, interim lead counsel did affirmatively request that the Court not  
20 permit Mr. Paris to simultaneously represent clients in the MDL and in West Virginia and  
21 Maryland state court due to an alleged impermissible conflict of interest that dual  
22 representation would cause. Furthermore, at oral argument, interim lead counsel restated their  
23 position with respect to Mr. Paris' continued role in the MDL action.

24 Under Rule 1.7(a) of the State of Arizona's Rules of Professional Conduct, "a lawyer  
25 shall not represent a client if the representation involves a concurrent conflict of interest."

---

26  
27 <sup>3</sup>These cases are: Pasternack, et al. v. Lifelock, Inc., et al., (D.N.J. 3:08-cv-2098);  
28 Martinez-Azoy v. Lifelock, Inc., et al., (S.D. Fla. 1:08-cv-21989); Ly v. Lifelock, Inc., et al.,  
(E.D. Tex. 2:08-cv-242); and Dillon v. Lifelock, Inc., et al., (C.D. Cal. 2:08-cv-4515).

1 Under Rule 1.7(a)(1)-(2) a concurrent conflict of interest exists when, “the representation of  
2 one client will be directly adverse to another client,” or “there is a significant risk that the  
3 representation of one or more clients will be materially limited by the lawyer’s  
4 responsibilities to another client, a former client or a third person or by a personal interest  
5 of the lawyer.” It is not clear whether representing the Falke and Gerhold Parties as well as  
6 four additional MDL Parties creates an inevitable concurrent conflict of interest for Mr.  
7 Paris, such that the Court would be entitled to remove him from the MDL proceedings. First,  
8 the interests of these six Parties are in no sense directly adverse. Secondly, Mr. Paris’  
9 representation is not necessarily ‘materially limited’ in the MDL action given his  
10 responsibilities as counsel in the Falke and Gerhold matters.

11 It should be noted that at oral argument interim lead counsel raised the possibility that  
12 Mr. Paris may have withheld from them certain documents related to the consolidated  
13 remand motion. As previously stated, the burden of proof and production for invoking  
14 diversity jurisdiction under § 1332 fell to Defendants, who chose not to take a position on  
15 the instant consolidated motion. Interestingly, before Falke and Gerhold had been transferred  
16 to this Court by the MDL Panel, Defendants contested in the transferor federal district courts  
17 at least one earlier iteration of the consolidated remand motion. According to interim lead  
18 counsel, while litigating this previous remand motion, Mr. Paris may have received from  
19 Defendants documents that potentially supported the invocation of federal diversity  
20 jurisdiction. These documents arguably reflected Defendants position with respect to the  
21 total number of LifeLock clients in West Virginia and Maryland and LifeLock’s possible  
22 liability in each state. As such, these documents may have stated that the \$5,000,000  
23 requirement of CAFA had been met. At oral argument, interim lead counsel suggested that  
24 they were unable to secure these or other potentially relevant documents from Mr. Paris,  
25 which may have aided interim lead counsel in contesting the consolidated remand motion.

26 If true, these accusations are troubling. Without directly addressing the merits of the  
27 non-moving Plaintiffs’ claims, the Court notes in the future it expects Mr. Paris, along with  
28 every other attorney for the named Plaintiffs, to cooperate with the Court appointed interim

1 lead counsel. Obviously, cooperation includes complying with their requests for potentially  
2 relevant information.

3       Although the Court declines to take any action with respect to Mr. Paris, it notes that  
4 if an attorney were to receive documents in a state court lawsuit and then withhold those  
5 documents from the Court appointed interim lead counsel in a related MDL case — should  
6 that lawyer concurrently represent clients in both matters — such action would raise serious  
7 questions under Rule 1.7(a) of the State of Arizona's Rules of Professional Conduct.  
8 Therefore, while the Court declines to disqualify Mr. Paris from the MDL action, should new  
9 and substantial allegations relating to the development of a potential concurrent conflict of  
10 interest develop in the future, the Court will again take up the issue, if so prompted.

11       **Accordingly,**

12       **IT IS HEREBY ORDERED** granting Plaintiff Kevin Gerhold, individually, and on  
13 behalf of all others similarly situated in the State of West Virginia, and Plaintiffs Gerald and  
14 Marlene Falke, individually, and on behalf of all others similarly situated in the State of  
15 Maryland, Consolidated Motion to Remand to State Court Pursuant to 28 U.S.C. § 1447.  
16 (Dkt.#74.)

17       **IT IS FURTHER ORDERED** directing the Clerk to remand Gerhold v. Lifelock, Inc., et al.,  
18 2:08-0857 (S.D.W.V.) back to the Circuit Court of Jackson County, West Virginia.

19       **IT IS FURTHER ORDERED** directing the Clerk to remand Falke v. Lifelock, Inc., et al.,  
20 08-CV-1351 (D. Md.) back to the Circuit Court for Washington County, Maryland.

21       **IT IS FURTHER ORDERED** that Plaintiffs' Master Complaint not include claims  
22 from individuals located in either the State of West Virginia or the State of Maryland.

23       ///

24

25

26

27

28

1           **IT IS FURTHER ORDERED** granting Justin M. Klein's Motion to Withdraw as  
2 Attorney. (Dkt.#91.)

3           DATED this 24<sup>th</sup> day of July, 2009.

4  
5  
6           Mary H. Murguia  
7           United States District Judge  
8

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28